herself, do not militate against the position of the principal case, on account of the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself. See *People* v. *McCoy*, 45 How. Pr. 216.

The well-considered cases of *Walsh* v. *Sayre*, 52 How. Pr. 334; and *Schræder* v. *The Chicago, R. I. & P. Rd. Co.*, 47 Iowa 375, are the only cases with which we are acquainted, besides the principal cases, bearing directly upon the point in question; and if any authority were necessary, these would seem to be conclusive upon the question. We do not believe the doctrine of these cases can ever be successfully controverted, founded as they are upon the soundest reason and being necessary to the interests of justice.

MARSHALL D. EWELL.

Chicago.

Since the foregoing note was written the Supreme Court of Nebraska has again passed upon the question involved in the principal case of *Sioux City & P. R. R. Co.* v. *Finlayson*, and has adhered to that decision: *Stuart* v. *Havens*, 22 N. W. Rep. 419. The case of *Hatfield* v. *St. Paul & D. Rd. Co.*, 22 Id. 176, recently decided by the Supreme Court of Minnesota, may also be read with profit. In the latter case, which was an action for personal injuries, it was held that the court has power in a proper case and under proper circumstances to require the plaintiff to perform a physical act in the presence of the jury, that will show the nature and extent of his injuries, but that the propriety of doing so in a given case rests largely in the discretion of the trial court. In this case the *uncontradicted* evidence of a number of witnesses showed that since receiving the injury complained of the plaintiff was lame and "limped" when she walked; and it was held that the court committed no error in refusing to require her to walk across the court room in the presence of the jury. In delivering the opinion of the court, MITCHELL, J., referred to the case of *Schræder* v. *Chicago, &c., R. R. Co.*, and conceded the correctness of the principle contended for in the above note. Upon the whole no reason appears why we should change the opinion already above stated.

M. D. E.

Supreme Court of Vermont.

WELLS *v.* TUCKER.

Where a sale is made of land, separate portions of which are subject to separate mortgages, and the vendee as part of the price assumes the payment of said mortgages, and subsequently the vendor is compelled to pay one of them, the vendee cannot maintain a bill against the vendor to redeem the land from such mortgage without also paying the other mortgage.

BILL IN EQUITY. Defendant Tucker, owning a farm on each undivided half of which rested separate mortgages given by him, conveyed the same to defendant Wells, the deed referring to said mortgages, describing the notes thereby secured, and stating that "said Wells assumed the payment of said notes agreeably to their tenor, and to save the said Tucker harmless and indemnified therefrom;" and the amount due on said mortgage was reckoned as

a part of the purchase-money. Wells accepted said deed, and went into possession under it; and on May 1st 1881, conveyed his equity of redemption to his mother, who now, with his wife who claimed an estate of homestead, filed this bill to redeem one of said mortgages as against Tucker who had been compelled to pay it, without redeeming the other. The master found that the trade for the farm "was all one trade," and the assumption of the mortgages "all one assumption."

J. P. Lamson and *S. C. Shurtleff*, for complainants.

J. A. & Geo. W. Wing, for defendant Tucker.

The opinion of the court was delivered by

ROWELL, J.—By accepting the deed from Tucker and going into possession under it, Wells assumed and agreed to pay both mortgages as a part of the purchase-money, and to save Tucker harmless and indemnified therefrom. As between Tucker and Wells, Wells thereby became primarily liable for the payment of said mortgages, and Tucker became his surety therefor, and the land became the primary fund out of which payment was to be made. It is clear, Wells failing to pay as he agreed, that Tucker could pay and be subrogated in equity to the mortgage security; but this is not the only effect of Wells's agreement. By it the two mortgages were consolidated and made one as to Wells and all persons claiming under him, and the burden of each was annexed to, and made to rest upon the whole land; and this, not because the lien of each was thereby actually extended over the whole land, but because of the contract itself, which equity takes cognisance of, and will enforce in favor of Tucker as against Wells and all persons standing in his stead.

The case of *Welch* v. *Beers*, 8 Allen 151, is full authority for this view, and was thus: Prescott held a mortgage for $500 on a whole tract of land, and had taken possession to foreclose. After the making of the mortgage, the mortgagor conveyed a part of the tract, with an agreement recited in the deed, that the grantee assumed and was to pay the whole of the mortgage as a part of the purchase-money. Afterwards the mortgagor conveyed the remainder of the tract to the plaintiff in fee, not covenanted against the mortgage, but with an express understanding that it was to be paid in full by the prior purchaser. Prescott subse-

quently took a new mortgage of the first part for $1200, with full knowledge of said agreement, and the value of that part was more than enough to pay the $500 mortgage. *Held*, that the plaintiff's part of the land was exempt from said last-mentioned mortgage, not because his deed of warranty left the whole burden of it to rest upon the other part, but because said agreement expressly annexed it to such part before the plaintiff purchased.

This is very analogous to the rule in equity, that when land subject to mortgage is sold by the mortgagor in separate parcels to different purchasers, without an assumption by them of any part of the mortgage debt, and the deeds are duly recorded, or actual notice is had of the state of the title and the subsisting equities, the purchasers, as between themselves, are charged, and must contribute in the inverse order of the time of their purchases. This rule rests upon the ground, that when a mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right, as between him and the purchaser, that the part still held by him should be first applied to the payment of the debt, and so equity charges it with such payment. But this is not, as was said in *Welch* v. *Beers*, because a deed of warranty of part, of itself, directly creates a lien on the remainder for the whole amount of the mortgage, but because equity recognises the mortgagor's contract as binding on subsequent purchasers who take with notice thereof.

So here, it is right as between Tucker and Wells, that Wells should pay both mortgages before holding any part of the farm free from either; and a court of equity would not aid him, as against Tucker, to redeem one of them only, and thus enable him to hold an undivided half of the farm free from both, for this would be contrary to the spirit of his agreement, and he who seeks equity must do equity. And the complainants have no better right than Wells himself had, for they sit in his seat.

Decree affirmed and cause remanded.